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IN THE

# Supreme Court of the United States

October Term, 1938.

No. [redacted] 68

WILLIAM HELIS, *Petitioner*,

v.

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of BRYAN WARD, deceased, ET AL., *Respondents*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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*To the Honorable the Supreme Court of the United States:*

*Your Petitioner Respectfully Shows:*

### I.

### SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner, appellee in Circuit Court of Appeals, a resident of Louisiana, agreed to buy certain oil leases from respondents, residents of Texas, and to pay therefor either $300,000.00 or $400,000.00 dependent upon the rate of pro-

duction of oil from either of two oil wells to be drilled on the property subject to the leases. One of the wells did not produce so that the amount of the purchase must be determined solely by the production of the other well.

The contract provided, R. 28:

> "(a) In the event the Bernard No. 2 well or the Bernard No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be $300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells.
>
> "(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of production more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be $400,000.00."

A choke is a device inserted in the pipe of an oil well which, like a nozzle, reduces the size of the orifice through which the liquid is permitted to flow.

Upon the trial in the District Court respondents attempted to justify the larger purchase price of $400,000 by introducing evidence of the production of the well calculated upon test flows of oil through chokes of various sizes other than a 3/8-inch choke. Upon objection by petitioner the District Judge excluded the testimony as to everything except production upon a 3/8-inch choke (R. 103). The Judge observed in the course of the trial that the capacity of the well was to be calculated upon a 3/8-inch choke and that what it could do under this choke was the decisive factor in the case (R. 119). He further observed that there was no ambiguity in the contract (R. 107, 115).

Upon the close of the testimony for respondents, the following appeared as established by their witnesses and these facts were used by the District Judge in his opinion:

(1) The capacity of a well on any particular choke is what it will produce on that choke. If run on one choke for less than 24 hours the calculation of production would be the amount of oil produced on that choke over the given period of time, calculated to represent a 24-hour period (R. 113, 114, 115).

(2) The well in question was actually tested upon a 3/8-inch choke for various periods of time and the tests, calculated upon a 24-hour basis, showed a production of only 1,233 barrels per day instead of 3,000 barrels (R. 112, 113).

(3) The well in question could not produce 3,000 barrels of oil per day under a 3/8-inch choke, due to the type of the oil and volume of pressure which was present (R. 116).

(4) It was not the general practice to permit a well of this type to operate on open flow (without the use of a choke) (R. 106) and it would be impossible to calculate the open flow production of the well by calculations made on a 3/8-inch choke (R. 115, 116).

Relying upon the rulings of the trial judge that the production of the well operating under a 3/8-inch choke was the only issue in the case, petitioner introduced none of the evidence on other issues which it had available in court on the day of trial. The respondents themselves proved that the well could not make 3,000 barrels of oil per day on a 3/8-inch choke and the court so found and entered judgment for petitioner.

Respondents appealed to the Circuit Court of Appeals and secured a reversal of the judgment of the District Court and the entry of a judgment in their favor. One Circuit Judge dissented.

The Circuit Court of Appeals reinterpreted the contract provisions quoted at the beginning of this statement and held (1) that the issue in the case was the productive capacity of the well on open flow, without any choke, and not its average daily capacity on a 3/8-inch choke for the period stated in the contract; and (2) that the well could be made to produce more than 3,000 barrels per day on open flow.

Upon this theory and finding of fact the court reversed the judgment of the District Court and directed the entry of a judgment for respondents decreeing the price payable to be the greater amount of $400,000 mentioned in the contract.

Apart from the violence done to the language of the contract by the Circuit Court of Appeals, its entry of judgment for respondents without remanding the cause for a new trial upon the new theory of the case deprives petitioner of substantial rights. Petitioner has had no real opportunity to offer his evidence upon the productive capacity of the well calculated upon any basis other than under 3/8-inch choke, since the District Court limited the trial to that one issue.

Furthermore, the finding of the Circuit Court of Appeals that the well would make more than 3,000 barrels of oil per day on open flow could be based only upon the opinions of two engineers whose tests of the well, as indicated by their reports, showed that the well did not produce 3,000 barrels per day under any of the chokes actually used by them (R. 204-208, 208-214). The well was never run on open flow. Petitioner was justified in disregarding these estimates when the trial judge ruled that production under a 3/8-inch choke was the only point at issue.

The statement in the opinion of the Circuit Court of Appeals that this well actually produced for many months more than 3,000 barrels of oil per day (R. 230) has, as pointed out in the first paragraph of the dissenting opinion of Judge Sibley (R. 235), no support in the record and results from confusing the total production of all the wells on the lease with the total production from the single well in question.

Even if the Circuit Court of Appeals correctly interpreted the provisions of the contract, which petitioner denies, justice demands that the case be remanded to the District Court for a new trial and a finding upon whether or not the well was capable of producing 3,000 barrels per

day upon open flow. Upon such a trial petitioner and respondents will both have an opportunity to introduce evidence upon the new issue not heretofore tried in court.

## II.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of said Court of Appeals in directing the rendering of judgment on a theory which was not tried in the District Court and as to which all evidence was excluded by the trial judge so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The decision of said Court of Appeals as to the manner of calculating the productive capacity of an oil well on a given choke, by holding the productive capacity to be its capacity upon some other size choke or with no choke, is a decision upon an important question of general law affecting the entire oil producing industry which is probably untenable and contrary to the understanding recognized and acted upon by those engaged in the industry.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals had in the case numbered and entitled on its docket No. 8725, Mrs. Itasca Kinney Ward, as Executrix of the Estate of Bryan Ward, deceased, et al., Appellants, versus William Helis, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by this court and the judgment of the

District Court be reinstated, or in the alternative, that the cause be remanded to the District Court for further trial, and for such further relief as to this court may seem proper.

WILLIAM HELIS,

By EUGENE D. SAUNDERS,
*Attorney for Petitioner.*

LLOYD J. COBB,
*Of Counsel.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Supreme Court of the United States:*

*Your Petitioner Respectfully Shows:*

### I.

### OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 229) is reported in 102 F. (2d) 519; and the opinion of the United States District Court for the Eastern District of Louisiana (R. 85) is reported in 20 F. Sup. 514.

## II.

## JURISDICTION.

1. The date of the judgment to be reviewed is March 24, 1939 (R. 229).

2. The statutory provision which is believed to sustain the jurisdiction of this court is United States Code, Title 28, Section 347 (a).

3. The trial court excluded all evidence designed to show the amount of oil the well was capable of producing on other than a 3/8-inch choke (R. 103). The Court of Appeals predicated its decision entirely upon its finding of fact as to the capacity of the well on other than a 3/8-inch choke (R. 237). In so deciding the said Court of Appeals acted upon a theory not tried in the District Court and upon facts not contained in the record, as so contended by petitioner in his application for rehearing (R. 245) and gave the contract an impossible construction at variance with the understanding prevailing throughout the oil producing industry (R. 244).

4. The cases believed to sustain said jurisdiction are as follows:

*Willing* v. *Binenstock*, 302 U. S. 272;
*Erie R. Co.* v. *Tompkins*, 304 U. S. 64;
*Duke Power Co.* v. *Greenwood County*, 299 U. S. 259;
*Lutcher & Moore Lumber Co.* v. *Knight*, 216 U. S. 257;
*Saunders* v. *Shaw*, 244 U. S. 317.

## III.

## STATEMENT OF THE CASE.

This has already been stated in the preceding petition under I (pp. 1-5), which is hereby adopted and made a part of this brief.

## IV.

## SPECIFICATION OF ERRORS.

1. The court erred by deciding the merits of this case on facts not contained in the record and on a theory which had never been tried by the litigants and as to which the trial court had expressly excluded all evidence.

2. The court erred in holding that the average daily capacity of an oil well for a stated period, calculated on a specified choke, is the greatest amount of oil which such well can be computed to be capable of producing on any size choke, or without choke, for any period of time, no matter how brief.

## ARGUMENT.

### Summary of the Argument.

Point A. When a litigant objects to the introduction of evidence and the objection is sustained he is fully justified in relying on such ruling. He need not introduce evidence to refute a point which the trial court upon his objection has ruled to be irrelevant and not involved in the litigation. A litigant is deprived of his day in court and of due process of law when a court, either trial or appellate, decides a case against him upon a point which he has not tried because of justifiable reliance upon a ruling of the trial judge.

Point B. The daily capacity of an oil well calculated on any given choke, is the amount of oil the well is capable of producing on that choke in a twenty-four hour period. The average daily production or capacity of such well for a stated period, calculated on a given choke, is the average of what it did or could produce if operated constantly for such period on such choke. It is admittedly impossible to determine the capacity of an oil well on one choke by calculations based on what it produces on another choke. The average daily production or capacity of an oil well for a stated period is not determined by merely ascertaining its momentary peak production.

## POINT A.

### Case Decided on Point Not Litigated in Trial Court.

Upon the trial in the District Court one of the witnesses for respondent started to testify as to production tests which he had made of the well on chokes other than a 3/8 inch (R. 103). Counsel for petitioner herein immediately objected to any such testimony (R. 103). The court thereupon ruled:

> "I sustain the objection. The witness' report is already in, but I will allow him to testify as to the 3/8th inch choke." (R. 103)

The report referred to by the trial judge was admissible because including tests made on a 3/8-inch choke, but not for any other purpose in view of this ruling. It is contained in the transcript (R. 204).

The principal witness for respondents and the only witness testifying to the capacity of the well, testified that the capacity of the well on a 3/8-inch choke was 1233 barrels per day (R. 112, 113); that the capacity of an oil well on a given choke was "just what it would produce" on that choke (R. 113, 115); and that it would be impossible to ascertain the open flow of the well by calculations made on a 3/8-inch choke (R. 115, 116).

As this evidence by the witness for respondents proved conclusively that the well could not produce anywhere near 3000 barrels per day on a 3/8-inch choke and as the trial judge had ruled that this was the only issue in the case, petitioner did not even place a witness on the stand to testify regarding the open flow capacity of the well. The trial judge rendered judgment for petitioner and respondents appealed.

The Court of Appeals concluded that the trial judge had erred in his construction of the contract and that its true meaning was to require the determination of the open flow capacity of the well. The Court of Appeals found the open

flow capacity of the well to be in excess of 3000 barrels per day and accordingly directed the District Court to enter judgment for the larger purchase price (R. 229). This finding of the capacity of the well by the Court of Appeals was predicated upon the report of an engineer or umpire which is in the record as a part of the pleadings but which was never offered in evidence (R. 208). This report would, however, have been admissible under the ruling of the trial judge both because dealing partly with the issue, capacity under 3/8 inch choke, recognized by that ruling and because being the report of an umpire designated under the contract.

A rehearing was applied for (R. 243) and refused (R. 249).

Judge Sibley dissented both from the judgment (R. 238) and from the refusal to grant a rehearing (R. 247).

The true import of the decision herein of the Circuit Court of Appeals is that the District Court erred in its ruling upon the objection to evidence and that it should have received evidence to show the open flow capacity of the well; that the decision of the District Court was predicated upon an improperly made record. Under virtually identical circumstances your Honors have declared it improper for the appellate court to render judgment and you have exercised your supervisory power to assure orderly procedure. In so doing you said:

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

*Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 256, 267.

You have said that identical procedure by the Supreme Court of a state deprived a citizen of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States; *Saunders* v. *Shaw*, 244 U. S. 317.

Your Honors have also said:

> "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented.
>
> *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 268.

In other decisions you have given effect to this same rule:

*Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518.
*U. S.* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416.
*Willing* v. *Binenstock*, 302 U. S. 272.
*Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

The Circuit Courts of Appeals have repeatedly recognized and followed this rule so clearly enunciated by your Honors.

> "• • • Since the District Court sustained the defendants' contention that this issue was not on trial, it is probable that they did not take their full proofs on that subject, and a final decision on the present record might be unjust. Under these unusual conditions, we see no way to insure that the full controversy shall be finally decided, in this case and upon a proper record, save to direct that the decree be reversed as to appellees and the case remanded; • • •."
>
> *Fifth Third National Bank* v. *Johnson*, 219 F. 89, 95.

To the same effect:

*Columbus Gas & Fuel Co.* v. *City of Columbus*, 55 F.(2d) 56.
*Faulks* v. *Schrider*, 90 F. (2d) 370.
*Hughes* v. *Reed*, 46 F. (2d) 435.
*Wilson* v. *Spencer*, 261 F. 357.
*Underwood* v. *Com'n. of Internal Revenue*, 56 F.(2d) 67.
*Finefrock* v. *Kenova Mine Car Co.*, 22 F.(2d) 627.
*Hamilton Gas Co.* v. *Watters*, 75 F. (2d) 176.

## POINT B.

**Decision of Court of Appeals is Erroneous Decision of Important General Question of Law Affecting the Entire Oil Producing Industry.**

The general question here presented is the method of ascertaining the capacity of an oil well on a given choke.

This transcript contains proof that the use of a choke on an oil well is the general practice of the industry (R. 117). The record shows that the capacity of an oil well on a given choke is what it will produce on that choke (R. 113).

The Court of Appeals has held in this case that the capacity of an oil well is the maximum it is capable of producing and that to require its capacity to be calculated on a 3/8-inch choke is merely to exact that its greatest capacity be computed by measurements taken on a 3/8-inch choke and used as a base along with measurements taken on other size chokes.

The importance of this question to the whole oil producing industry is evident. Every oil producing state of any consequence imposes restrictions on the rate or quantity of production of oil. Each field and each well is given an "allowable". This allowable is the amount of oil which may be legally produced per day. The amount of this allowable as to each well is determined principally by calculating the maximum capacity of the well on a choke of a prescribed size. Confusion as to the proper method of ascertaining

the capacity of an oil well by calculations made on a prescribed size choke would have far-reaching consequences. An authoritative decision of the question would be of inestimable benefit to the entire industry.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

EUGENE D. SAUNDERS,
*Attorney for Petitioner.*

LLOYD J. COBB,
*Of Counsel.*